IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 48 OF 1989

1. Babasaheb Satgonda Patil,
Age: 52, Occ.: Agriculture,
of Udgaon Tahsil Shirol,
District Kolhapur.

2. Shantinath Babasaheb Patil,
Age 20, Occ.: Agriculture,
resident of Udgaon, Tah: Shirol,
District Kolhapur. .... Appellants.
(Org.Defendants
Nos.1 & 2.)

Versus.

1. Popat @ Adgonda Satgonda Patil,
(since deceased through LRs.)
(a) Smt.Shantabai Adgonda Patil,
(b) Mahavir Adgonda Patil,
Age: 16 years.
(c) Kum.Shobha Adgonda Patil,
Age: 17 years.
(d) Kum.Laxmi Adgonda Patil,
Age: 14 years.
1(b) to 1(d) are minors through
their guardian No.1(a).
all residing at Udgona, Tal.Shirol,
Dist. Kolhapur.

2. Annasaheb Satgonda Patil,
(since deceased through LRs.)
(a) Anil Annasaheb Patil.,
(b) Rajmati Annasaheb Patil.
(c) Sou.Lalita Subhash Gajennawar
2(a) & 2(b) residents of Jaysingpur
Mala Bhag, 1st Lane, Jaisingpur,
Tal.Shirol, dist.Kolhapur.
2(c) resident of Sudarshan,
Plot No.22, Priyadarshani Housing
Society, Jaisinghpur, Tal.Shirol,
Dist. Kolhapur.
2(d) Sou.Vijaymala Shrikant Chougule
R/o.14th Lane, Jaysingpur,
Taluka Shirol, Dist. Kolhapur.
2(e) Sou.Pushpa Arvind Banijwade,

R/o.Shedshal, Taluka Shirol,
Dist. Kolhapur.
2(f) Slou.Sunanda Bharmappa Alpannawar,
R/o.Jaysingpur, Mala Bhag, 1st Lane,
Taluka Shirol, Dist. Kolhapur.

3. Smt.Sarojani Bapusaheb Patil,
Age: 40, Occ.: Agriculture, and
Household work of Jayasingpur.

4. Sunil Bapuso Patil,
(since deceased through LRs.)
(a) Kanchan Sunil Patil
(b) Kum.Kajan Sunil Patil.
(c) Rushikesh Sunil Patil,
All R/o.Mala Bag, 1st Lane,
Jaisingpur, Tal.Shirol,
Dist.Kolahpur.
(b) & (c) being minors through
their mother and natural
guardian No.4(a).

5. Rajendra Bapuso Patil,
Major, Occ.: Household work of
Jaisingpur.

6. Kum.Sujata Bapuso Patil,
Major, Occ.: Household work of
Jaisingpur.

7. Kum.Vanita Bapuso Patil,
Major, Occ.: Household work of
Jasingpur.

8. Kum.Babita Bapuso Patil,
Major, Occ.: Household work of
Jaisingpur.

9. Namgonda Satgonda Patil,
Age: 43, Occ.: Agriculture,
and Police patil of Udgaon.

10.Babaso Girgonda Patil,
Age: 41, Occ.: Agriculture of
Jaisinghpur.

.... Respondents
(No.1-Org.Plaintiff &
Nos.2 to 10-Org.Deft.
Nos.3 to 11.)

Shri A.A.Kumbhakoni with Shri Tejpal S.Ingle for the Appellants.

Shri N.V.Walavalkar with Shri V.B.Rajure for the Respondent No.1.

CORAM : ABHAY S. OKA, JJ.

DATED : 27th & 28th January, 2004.

ORAL JUDGMENT.

1. This Second Appeal was admitted on 3rd March 1989. While admitting this Second Appeal, this Court observed that the Appeal was admitted on grounds 5(a) and 5(b). Though substantial questions of law were not specifically framed, it is obvious that this Court was of the view that grounds 5(a) and 5(b) raised substantial questions of law. Grounds 5(a) and 5(b) read thus:

5(a) Whether by virtue of a partition of 1960 the Defendant No.1 has become the owner of the suit lands and under which no other land was allotted to Defendant No.1 and therefore the subsequent transfer of the suit lands to Laxmibai and execution of the Will is binding on the Defendant No.1 ?

5(b) Whether the lower Appellate Court has considered the true effect of mutation

entries relating to partition of 1960, which confer ownership of suit lands on Defendant No.1?

2. I have heard Shri Kumbhakoni, learned Counsel appearing for the Appellants and Shri Walawalkar the learned Counsel appearing for the Respondent No.1 at length. With a view to appreciate their submissions it is necessary to refer to the facts of the case in brief.

3. For the sake of convenience the parties are hereinafter referred to with their to their status in the original suit. The Appellants are the Defendants Nos.1 and 2 in the suit. The Respondent No.1 is the original Plaintiffs and the Respondents Nos.2 to 10 are the Defendants Nos.3 to 11. The case of the Plaintiff is that he is the exclusive owner of the suit property on the basis of a Will executed by his deceased mother. The case of the Plaintiff is that the suit properties were owned by the joint family of his father and brothers. It is the case of the Plaintiff that the during the lifetime of his father Satgonda Patil there was oral partition of the joint family properties and entries were made in the revenue records of the said partition and accordingly parties were in separate possession of their respective shares.

4. The case of the Plaintiff is that in the said partition no share was allotted to his mother Laxmibai and therefore, the suit properties which were allotted to the share of the father were given by him to the Plaintiff's mother in lieu of the maintenance and accordingly the Plaintiff's mother was in possession of the suit properties till her demise. The case of the Plaintiff is that by virtue of section 14 of the Hindu Succession Act, 1956 (hereinafter referred to as "the said Act of 1956") the Mother Laxmibai became the exclusive owner of the suit property. The further case of the Plaintiff is that by her last will dated 12th September 1975 Laxmibai bequeathed the said property in favour of the Plaintiff. The case of the Plaintiff is that the Defendants Nos.1 and 2 were trying to obstruct the lawful possession of the Plaintiff over the suit properties. Therefore, a suit for perpetual injunction was filed by the Plaintiff.

5. The Defendants Nos.1 and 2 contested the suit by filing their written statement. The Defendants Nos.1 and 2 disputed that during the life time of the father Satgonda the joint family properties were partitioned. It was submitted that the deceased father had no right to give the suit properties to the mother in lieu of

maintenance and therefore, the deceased mother did not acquire any right, title and interest in the property. It was therefore submitted that the deceased mother will not get benefit of the provisions of section 14 of the said Act of 1956. The Defendants also denied execution of the Will by the deceased mother. It was stated in the written statement that the thumb impression on the alleged will was not of the mother. It was stated that even assuming that there was thumb impression of her mother, she was not at all in a state of mind to execute the Will as she was bed ridden at that time. It was specifically contended in the Written Statement that the suit land were not allotted at the time of effecting partition as the suit lands were inam lands and the inam was not abolished at that time. It is submitted that after abolition of Inam the suit lands were to be allotted to the share of the Defendant No.1. It was lastly contended that by family arrangement effected in the year 1965 the deceased Laxmibai relinquished her rights in respect of the suit properties in favour of the Defendant No.1. Defendant No.3 has filed a separate written statement opposing the claim of the Plaintiff.

6. The learned trial Judge decreed the suit filed by the Plaintiff. The learned trial Judge held that the Plaintiff became the absolute owner of the suit

properties by virtue of the Will dated 12th September 1975 executed by the mother Laxmibai. The learned trial Judge accepted the contention of the original Plaintiff that the suit properties were given to Laxmibai in lieu of maintenance.

7. An appeal was preferred by the Defendants Nos.1 and 2 to the District Court and by the impugned Judgment and Decree the Appeal was dismissed.

8. The learned Counsel Shri Kumbhakoni appearing for the Appellants firstly submitted that the recitals in the writing dated 25th April 1960 clearly show that when the partition was effected during the lifetime of the father, the land bearing Revision Survey No.75/76, 77/2, 98/2, and 557/3 were kept in the name of the father as the same were Inam lands. He submitted that the said writing clearly reflects that the said lands will go to the share of the Defendant No.1 after the abolition of Inam. Shri Kumbhakoni further submitted that in view of the clear recitals in the writing dated 25th April 1960, the lands which were reserved for the Defendant No.1 could not have been further partitioned by the father unilaterally by making an application dated 21st July 1966. He submitted that the partition which was effected in the year 1960 could not have been

unilaterally reopened by the father Satgonda.

9. Shri Kumbhakoni thirdly submitted that the application made by the father on 16th January 1967 does not show that the suit lands were given to the mother Laxmibai in lieu of maintenance. He submitted that section 14 of the said Act of 1956 has no application and therefore, Laxmibai could not have become absolute owner of the said land. He further submitted that the alleged Will of the mother Laxmibai is not duly proved. He submitted that the attestation was not proved as the attesting witness has not deposed that the will was signed by the Testator in his presence and thereafter he attested the Will. Shri Kumbhakoni submitted that the suit simplicitor for injunction without seeking declaration was not maintainable. He submitted that the Plaintiff was aware that the rights of the deceased mother were all along being disputed by the Defendant and therefore, without seeking declaration the suit simplicitor for injunction was not maintainable. He pointed out that the deceased Laxmibai during her lifetime filed a suit for declaration in respect of the suit property. The said suit was disposed of as abated and therefore without setting aside the abatement of the suit, the Plaintiff cannot file the present suit and assert title.

10. Lastly Shri Kumbhakoni submitted that even if the decree for perpetual injunction is confirmed the issue of title may be expressly kept open. He relied upon the Judgment of the Apex Court reported in (2004) 1 S.C.C. page 769 (Rame Gowda (dead) by LRs. v/s. M.Varadappa Naidu (dead) by LRs. & another).

11. Shri Walavalkar the learned Counsel appearing for the Respondent No.1 submitted that the Appellants have never disputed the partition effected by the father in the year 1960. He stated that as certain lands were Inam lands, the same were impartible in the year 1960 and therefore, no partition was effected in respect of the said land. He submitted that after re-grant of the Inam lands in favour of the father, the said land ceased to be of impartible tenure and therefore, during the lifetime of the father in the year 1966 there was a further partition effected in which the land bearing Revision Survey No.75/2 admeasuring 1.10 H Revision Survey No.76/2 admeasuring 5.12 H and Revision Survey No.98/2 admeasuring 0.37 H was allotted to the share of the Appellants. He pointed out that effect was given to the said partition by mutation entry No.5260. He invited my attention to the Application dated 16th January 1967 made by the deceased father to the Talati

in which there is a categorical assertion that the suit lands were given by him to his wife in lieu of maintenance. Mutation Entry No.5528 was recorded on the basis of the said statement which also specifically records that the suit lands were given to the mother in lieu of maintenance. He pointed out a writing to that effect executed by the parties. He submitted that the Will dated 12th September 1975 of the mother has been duly proved by examining attesting witnesses. He submitted that the suit for perpetual injunction filed by the Respondent No.1 was based on title and therefore, there was adjudication of title by the trial Court. He submitted that in a suit of such a nature a decision on issue of title is required to be made. He relied upon the Judgment of the learned Single Judge of this Court reported in AIR 1969, Bombay, page 423 (Smt.Indumatiben Chimanlal Desai v/s. Union of India & ors.) and 2000 (3) Mah.L.J. page 347 (Ganesh D.Daivjna v/s. Prakash S.Salkar). He submitted that the Appellants did not raise the contention regarding maintainability of the suit simplicitor for injunction specifically in the trial Court. He submitted that such contention cannot be allowed to be raised for the first time in the Second Appeal. He placed reliance on the Judgment of the Apex Court reported in AIR 1987 S.C. 2251 (Smt.Gulwant Kaur & another v/s. Mohinder Singh and others) He also

relied upon another Judgment of the Supreme Court reported in AIR 1996 SC page 1697 (C.Masilamani Mudaliar & others v/s. The Idol of Sri Swaminathaswami Swaminathaswami Tirukoli and others) and submitted that sub-section (2) of section 14 of the said Act of 1956 is not applicable. He submitted that once it is held that the suit lands were given to the mother Laxmibai in lieu of right of maintenance, sub-section (1) of section 14 was attracted and by virtue of the said provisions the suit lands became the absolute property of the deceased Laxmibai.

12. I have carefully considered the rival submissions. In so far as the first contention of Shri Kumbhakoni that in the year 1960 the suit lands were allotted to the share of the Appellant No.1 is concerned, it is to be seen here that admittedly in the year 1960 the said lands were Inam lands and Inam was not abolished. As a result, the suit lands were impartible and the suit lands could not have been subjected to partition in the year 1960. The Courts below have accepted the case made out by the Respondent No.1 that in the year 1966 after abolition of Watan and re-grant of the suit land, further partition was effected by which the said Inam lands were partitioned. On the basis of the application made by the deceased father mutation entries regarding

partition of the said Inam lands were made in the year 1966. The application made by the deceased father discloses that out of a total area of 24.18 H of Inam land an area of 6.59 H was allotted to the share of the Appellant and accordingly mutation entry was made in the year 1966. In this view of the matter, the trial Court as well as the Appellate Court have accepted the theory of partition effected in the year 1966. In the year 1960 partition could not have been effected in respect of the Inam lands and therefore, by no stretch of imagination it can be said that in the partition the lands in question were allotted to the share of the Appellants. It must be noted here that the Vardi Application made by the deceased father on 21st July 1966 and the mutation entry No.5260 were exhibited in the trial Court. On the basis of the said documents the Courts below have recorded a finding that in so far as the suit lands are concerned, after regrant of the Inam lands, the same were allotted to the share of the deceased father. There are concurrent findings of fact recorded by the Courts below that the deceased father became the owner of the suit land by virtue of further partition effected in the year 1966. The said finding of fact is based on documentary evidence and it is not permissible to interfere with the same in a Second Appeal under section 100 of the Code of Civil Procedure,

1908. Therefore, what follows from the said findings is that the deceased father became the absolute owner of the suit lands and therefore, he had the authority to give the suit lands to the mother in lieu of maintenance. The Application dated 16th January 1967 and mutation entry No.5528 clearly shows that the suit lands were given by the deceased father to the mother Smt.Laxmibai in lieu of maintenance. A Vardi Application made which is also signed by the Appellant discloses that the suit lands were given to the mother in lieu of maintenance.

13. The question which arises is whether sub-section (1) of section 14 of the said Act of 1956 will have application to the facts of the case. It is to be noted here that the father died in the year 1969 and on the date of death of the father the suit lands were already mutated in the name of the mother in the Revenue Records. The condition precedent for applicability of sub-section (1) of section 14 is that the land must be given to the wife in lieu of maintenance and the land must be possessed by her. The possession of the property has to be in recognition of the right to maintenance. The Appellate Court has held that admittedly at the time of demise of the father, the mother Laxmibai was in possession of the suit land. The

revenue record also supports the case of possession of Laxmibai. In this view of the matter it is very difficult to accept the contention of the learned Counsel for the Appellant that sub-section (1) of section 14 will have no application. Once it is held that sub-section (1) of section 14 applies obviously there is no scope to rely upon sub-section (2) of section 14. In view of this position, there is no merit in the challenge to the findings recorded by the Courts below that the suit land became the absolute property of the deceased mother.

14. This takes me to the submission made by the learned Counsel for the Appellants on the proof of Will. He placed reliance on the Judgment of the Apex Court reported in (1995) 6 S.C. page 213 (Kashibai w/o.Lachiram and another v/s. Parwatibai w/o.Lachiram & others) and submitted that unless the attesting witness deposes that the will was signed by the deceased testator in his presence and that he had attested the document, the execution of the will cannot be said to be proved. The learned Counsel for the Appellants showed me the relevant part of the deposition of the witness No.2 examined by the Respondent No.2. In paragraph 2 of his deposition, the witness No.2 Babgonda has stated as under:

"2. Thereafter, we went to Deshpande Scribe. Then Laxmibai handed over the documents to Deshpande and asked him to scribe the will in favour of plaintiff. Those documents were pertaining to suit property. Then Deshpande scribed the Will and read over the same to Laxmibai. Laxmibai admitted the same and then she gave her thumb impression on the will. Then I and Dharamgonda attested the will. So also two other persons from Shirol attested the Will. We attested the will at the instance of Laxmibai. I am shown the will. It bears my signature as witness and thumb impression of Laxmibai. It is the same will. The will was written at the instance of Laxmibai."

He has also invited my attention to the deposition of witness No.3 examined by the Respondents i.e.Dharamgonda Patil. He has stated in his deposition as under:

"I know Plaintiff and Defendant and their mother Laxmibai. I know about the will executed by her. I was called by her to act as a witness. Then I went to the house of

> Laxmibai there P.W.2 was present. She told us that she wanted to execute the will in favour of the Plaintiff. She also told us to accompany them to Shirol. Accordingly Taxi was brought by plaintiff and we all went to Shirol. Then we went to one Deshpande scribe. She gave 7/12 extract and the extracts of houses to Deshpande and told him that the will is to be scribed. Then Deshpande obtained the thumb impression of Laxmibai on the Will. Then Laxmibai asked us to again as a witnesses. I and Babgonda Patil and two other persons from Shirol attested the Will. I am shown that Will. It bears my signature and thumb impression of that Laxmibai who gave it in my presence. It is same Will."

If paragraph 1 of the deposition is read in its entirety it is crystal clear that the witness has stated that he went to the house of deceased Laxmibai where witness No.2 (Babgonda) for Respondent No.1 was present. Both of them accompanies the deceased by taxi to Shirol and they went to the scribe by name Deshpande. He has stated that the said Deshpande obtained thumb impression of Laxmibai on the will and thereafter Laxmibai asked

both the witnesses to sign the Will. The said witness has stated that he himself and Babgonda Patil and two other persons from Shirol had attested the Will. In my view the depositions of both the witnesses are absolutely clear that both of them had seen Laxmibai executing the Will and both them have stated that they were present at the time of execution of the Will and they have attested the Will.

15. In so far as the existence of suspicious circumstances are concerned, there are concurrent findings recorded by the Courts below. The evidence on record shows that both the attesting witnesses were called to her house. Thereafter Laxmibai told them to bring a taxi and all of them travelled by taxi to Shirol. After execution of the will they proceeded to the office of the Sub-Registrar. The attesting witness Dharamgonda has deposed that the Sub-Registrar enquired with the deceased Laxmibai whether she had executed the Will voluntarily. Merely because the Respondent No.1 accompanied the deceased Laxmibai is not sufficient to make the execution of the will suspicious. It is obvious that Laxmibai was supported by the Respondent No.1. Laxmibai was required to file a suit for declaration of her title during her life time which was contested by the Appellants. I had to read the notes of

evidence in Second Appeal as the learned Counsel for both the sides have made submissions based on the evidence on record and taken me through the notes of evidence. However, the findings recorded by the Courts below in so far as the execution of the Will are concerned, are based on the evidence on record and there is no perversity in the findings recorded. No interference can be made with such findings in a Second Appeal.

16. This takes me to the submission made by the learned Counsel for the Appellants regarding maintainability of the suit. he submitted that the Respondent No.1 was aware that the Appellants were disputing the title of Laxmibai to the suit land and therefore, it was necessary for the Respondent No.1 to file a suit for declaration of ownership. Strong reliance is placed on the decision of the Apex Court in Rame Gowda's case (supra). It is necessary to refer to the facts of the case before the Apex Court. The appeal before the Apex Court was preferred by the original Defendant. The suit was filed by the original Plaintiff alleging his title as also possession over the disputed piece of land. The trial Court recorded a finding that the original Plaintiff had failed to prove his title, but had succeeded in establishing his possession over the suit

property. The trial Court therefore granted perpetual injunction restraining the Defendant from interfering with the peaceful possession of the suit property. A contention was raised that the suit itself was not maintainable inasmuch as the declaration of title was not claimed. It will be necessary to refer to paragraphs 11 and 12 of the Judgment of the Apex Court.

The said paragraphs read thus:

> "11. In the present case the trial Court has found the plaintiff as having failed in proving his title. Nevertheless, he has been found to be in settled possession of the property. Even the defendant failed in proving his title over the disputed land so as to substantiate his entitlement to evict the plaintiff. The trial Court, therefore, left the question of title open and proceeded to determine the suit on the basis of possession, protecting the established possession and restraining the attempted interference therewith. The trial court and the High Court have rightly decided the suit. It is still open to the defendant-appellant to file a suit based on his title against the plaintiff-respondent and evict the latter on

the former establishing his better right to possess the property.

12. The learned Counsel for the appellant relied on the Division Bench decision in Dasnam Naga Sanyasi v. Allahabad Development Authority and a Single Judge decision in Kallappa Rama Londa v. Shivappa Nagappa Aparaj to submit that in the absence of declaration of title having been sought for, the suit filed by the plaintiff-respondent was not maintainable and should have been dismissed solely on this ground. We cannot agree. Dasnam Naga Sanyasi case relates to the stage of grant of temporary injunction wherein in the facts and circumstances of that case, the Division Bench of the High Court upheld the decision of the court below declining the discretionary relief of ad-interim injunction to the plaintiff on the ground that failure to claim declaration of title in the facts of that case spoke against the conduct of the plaintiff and was considered to be "unusual". In Kallappa Rama Londa case the learned Single Judge has upheld the maintainability of a suit merely

seeking injunction, without declaration of title and on dealing with several decided cases the learned Judge has agreed with the proposition that where the suit for declaration of title and injunction is filed, and the title is not clear, the question of title will have to be kept open without denying the plaintiff's claim for injunction in view of the fact that the plaintiff has been in possession and there is nothing to show that the plaintiff has gained possession by any unfair means just prior to the suit. That is the correct position of law. In Fakirbhai Bhagwandas v. Maganlal Haribhai a Division Bench spoke through Bhagwati J.(as His Lordship then was) and held that it is not necessary for the person claiming injunction to prove his title to the suit land. It would suffice if he proves that he was in lawful possession of the same and that his possession was invaded or threatened to be invaded by a person who has no title thereof. We respectfully agree with the view so taken. The High Court has kept the question of title open. Each of the two contending parties would be at liberty to

plead all relevant facts directed towards establishing their titles, as respectively claimed, and proving the same in duly constituted legal proceedings. By way of abundant caution, we clarify that the impugned judgment shall not be taken to have decided the question of title to the suit property for or against any of the contending parties."

The Apex Court has noted that the trial Court had recorded a finding that the Plaintiff was in settled possession of the suit property and though he failed to establish his title, even the Defendant failed to establish his title so as to substantiate his entitlement to evict the Plaintiff. The trial Court therefore left the question of title open and proceeded to decree the suit on the basis of possession. The High Court while confirming the Judgment of the trial Court has also kept the question of title open. Reading the decision of the Apex Court as a whole, in my view the said decision cannot be read as laying the proposition that when the Defendant is disputing the title of the Plaintiff in possession, it is not open for the Plaintiff to file a suit simplicitor for injunction without claiming declaration. In this connection it

will be necessary to refer to the Judgment of the learned Single Judge of this Court in the case of Indumatiben (supra). In the said Judgment, the learned Single Judge held thus:

> "5. Coming to the form of the suit, the suit is so framed as to be a suit for an injunction. Under section 34 of the Specific Relief Act of 1963, a person may file a suit for a declaration as to any legal character, or as to any right to any property. This is a discretionary relief. Section 34 provides that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. Section 37 pertains to injunctions. Sub-section (2) provides that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, from the commission of an act, which would be contrary to the rights of the plaintiff. Section 38 prescribes when a perpetual injunction may be granted. The difference between section 34 on the one hand and sections

37 and 38 on the other hand is that the Court may not grant a declaration where the matter is capable of consequential relief. But there is no such restriction put on injunctions and the Court may grant an injunction as a substantive relief without any prayer for declaration, although in many cases a declaration may be implicit in the grant of a perpetual injunction."

It is also necessary to refer to the Judgment of another learned Single Judge of this Court reported in AIR 1998 Bombay 87 (Mulji Umershi Shah v/s. Paradisia Builders Pvt.Ltd.). In paragraph 11 of the Judgment the learned Single Judge held that in a suit for perpetual injunction the Court may be called upon to hold enquiry about title, right and interest as the case may be with a view to find out whether the Plaintiff is entitled to protection of his possession by decree of injunction. This Court held that the question of possession pre-supposes lawful possession and for the purpose of adjudication of that question, an enquiry into the title is not foreign to the subject matter. The averments made in the plaint shows that the suit filed by the Respondent No.1 is based on title. When the suit is filed by the Plaintiff claiming to be in lawful

possession of the immoveable property for perpetual injunction for protection of his possession and when by way of defence to such a suit title of the Plaintiff is disputed, the Court can always grant perpetual injunction as substantive relief. The Apex Court in a Judgment reported in AIR 1989 SC page 1809 (Corporation of City of Bangalore v/s. M.Papaiah & another) was dealing with the scope of a suit for perpetual injunction. In paragraph 4, the Apex Court held:

> "4. So far the scope of the suit is concerned, a perusal of the plaint clearly indicates that the foundation of the claim of the plaintiffs is the title which they have pleaded in express terms in paragraph 2 of the plaint. It has been stated that after cancelling the acquisition of the suit property for a burial ground the land was transferred to Guttahalli Hanumaiah under G.O.No.3540 dated 10.6.1929 on payment of upset price. In paragraphs 3 and 5 the plaintiffs have reiterated that the first plaintiff was the owner-in-possession. It is well established that for deciding the nature of a suit the entire plaint has to be read and not merely the relief portion, and the plaint in the present case does not leave any manner

of doubt that the suit has been filed for establishing the title of the plaintiffs and on that basis getting an injunction against the appellant Corporation. The court fee payable on the plaint has also to be assessed accordingly. It follows that the appellant's objection that the suit is not maintainable has to be rejected."

17. There is one more aspect of the matter. In the Written Statement filed by the Appellants no specific plea is raised that the suit simplicitor for injunction is not maintainable without praying for relief for declaration. A perusal of the issues framed by the trial Court does not show that such a contention was raised before the trial Court. Even in the Memorandum of Appeal filed in the District court, I find that such a contention is not raised. The title claimed by the original Plaintiff was on the basis of a Will dated 12th September 1975 executed by his mother Laxmibai. Various additional issues were framed subsequently by the learned trial Judge as regards the Will and competency of Laxmibai to make the Will. Both the parties have led evidence on the execution of the Will and also on the issues framed by the trial Court. Both the parties went to the trial on the issues with the knowledge of the

fact that the issue of title is being decided by the trial Court. Apart from the position of law, I am of the view that it was not open for the Appellant to raise the said objection about maintainability of the suit on the ground of failure to claim declaration of title. Shri Kumbhakoni made a submission in the alternative that the issue regarding title can be kept open as held by the Apex court in the case of Rame Gowda's case. There is no merit in the said submission also. In the case before the Apex Court the trial Court itself had left the question of title open and the view of the trial Court was confirmed by the High Court. After having contested the suit on the issue of title in the Courts below, now the Appellants cannot raise the contention that the issue of title be kept open.

18. The learned Counsel for the Appellants tried to submit that though the clear intention is reflected in the partition effected in the year 1960 that the Inam land would be allotted to the Defendant, as a result of the findings recorded he has been completely ousted from the family properties. The said contention is not obviously correct. In the partition effected in the year 1966, a substantial part of the Inam lands appears to have been allotted to the share of the Defendant No.1/Appellant No.1.

19. There is no merit in the Second Appeal and the same is dismissed with no order as to costs.

Judge.